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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 792

UNION PRODUCING COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION, *et al.*,
Respondents.

REPLY BRIEF FOR PETITIONER

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We beg to submit this short reply to the opposing brief of respondents:

1. *Question Presented.* Respondents' statement (br. p. 2) of the "Question Presented" is misleading because it in reality raises no question. It assumes the point to be decided and is not the issue presented in our petition.

2. *Administrative Irresponsibility.* Respondents' treatment of the Tenth Circuit's decision in *Amerada Petroleum Corporation* v. *Federal Power Commission*, decided March 17 1956 (reprinted in their appendix pp. 17 ff.), as being "in accord with" the decision of the District of Columbia Circuit here sought to be reviewed (230 F. 2d 36) is wrong in a significant way. It sharpens the issue so as to enable this Court clearly to see that respondents would create an area of administrative irresponsibility immune from judicial review.

The *Amerada* case decided that the 174 series of orders were *not* subject to review at the hands of an aggrieved

gas producer through the medium of immediate appeal under § 19(b) of the Natural Gas Act, 15 USC § 717r. Petitioner does not dissent from this holding nor seek here to bring it in question. Petitioner's course of action was the wholly independent one of immediate resort to equity by plenary suit. Now this is the remedy which, even under the aggravated circumstances here shown, the court below has held not to be available.

The consequence is that, even though imminently injured by the promulgation of the 174 series of orders with their general impact on contracts and customer relations, petitioner is not entitled to redress at the hands of any court either through § 19(b) (under the *Amerada* rule) or by independent plenary suit (under the rule now announced below). Under these circumstances, for respondents to treat the *Amerada* decision as "in accord with" the holding below, is to say that all access to the courts is cut off. The result achieved, if review through certiorari is not here possible, would be to leave the Federal Power Commission in exercise of a completely arbitrary power to take administrative action injurious to petitioner and others of its class without the possibility of any redress at the hands of the courts. Such cannot be the law.

3. *Illegality.* What respondents fail to take into account is that the attempted action by the Federal Power Commission here complained of was attacked by petitioner in the District Court (R. 7-16) as wholly outside the ambit of the Commission's statutory power. It is an asserted *illegal* action of the administrative agency which petitioner sought to have the court enjoin, differing in this respect from the errors in the exercise of admitted jurisdiction which § 19(b) is designed to correct. At this point the

rule of the *Skinner & Eddy* case 249 US 557 (quoted in our petition pp. 7-8) is exactly in point. Respondents err in telling the Court (br. p. 14) that "*Skinner & Eddy* and the other cases cited did not involve original District Court injunction suits brought, outside of statutory provisions for court review, by persons against whom an administrative order . . . had been issued". That is just what *Skinner & Eddy* did involve, as shown by the statement of facts made by this Court in 249 US at 558 and 560. Further, all the other authorities cited in our petition on the point dealt with original District Court injunction suits, except for *United States ex rel. De Lucia* v. *O'Donovan* 178 F. 2d 876.

4. *Petitioner's Dilemma.* Pointing up the essential ambiguity of respondents' position, we call the Court's attention to the fact that it is argued (br. p. 13 at top) that

> "the Power Commission must decide initially whether petitioner is subject to the Act at all"

whereas it is also argued on the same page (br. p. 13 at bottom) that

> "this Court has already held that the Commission has jurisdiction over the independent producers generally".

Unless "the independent producers generally" include the petitioner, the latter statement makes no sense. If it is to be contended that the Commission's jurisdiction over this petitioner has already been pre-judged by this Court on the wholly different record in the *Phillips* case, 347 US 672, then indeed Order 174-A with its crushing economic impact upon petitioner's business relations with customers (peti-

tion pp. 5-6) will have been imposed on petitioner without judicial hearing or determination. The denial of due process is patent. This is the conclusion denounced by this Court's holding in the *Columbia Broadcasting* case, 316 US 407. The gross inequity resulting is what petitioner sought to be rescued from through the injunction below. The questions alleged to be "peculiarly within the Commission's competence" (br. p. 9) involve no *expertise* whatever, but are naked questions of law for the Court.

5. *Rule of Columbia Broadcasting.* Respondents' attempt to differentiate *Columbia Broadcasting System* v. *United States* 316 US 407 (br. pp. 12-3) fails. Our petition has pointed out (pp. 11-4) the close similarity between the two situations. The statement in the opinion below that C.B.S. attacked the broadcasting regulations in their entirety whereas this petitioner seeks only to have particular transactions classified as outside Order 174-A (230 F. 2d at 39), is not a tenable distinction, because even the court below concedes on the next page that petitioner directed its attack before the Commission "to the order as a whole" (230 F. 2d at 40). Thus the court below, while admitting the comparability of the situations, did not give petitioner the benefit of the same application of the general rule. Petitioner did indeed attack Order 174-A in its entirety, in so far as applying to the petitioner.

6. *State Jurisdiction.* The interference with State conservation regulations threatened by the 174 series of orders is handled by respondents with disappointing incompleteness (br. p. 15). The attempted rectification of the prior order, which was inserted in Order 174-B (App. 110) *after* the injunction had issued below, did not meet the difficulty at all. It was quite illusory. It provided that the Commis-

ion would recognize only "valid" conservation orders (see footnote 7, p. 18 of petition) of a State agency "relating to the production or gathering" of gas. By these phrases the Commission reserved the broadest latitude of exception and exclusion as regards the State regulatory jurisdictions to which petitioner is subject alike in Texas, in Louisiana, in Mississippi.

Conclusion

Respondents' opposition only underlines the conclusion that the action of the court below presents major questions in the interpretation of the Natural Gas Act and the application of administrative law which should receive immediate attention at the hands of this Court.

Respectfully submitted,

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